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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TAYLOR WADE JOHNSTON, Defendant and Appellant.	H045905 (Santa Clara County Super. Ct. Nos. C1524693 & C1631413)

Taylor Wade Johnston was granted probation after he pleaded no contest to two felonies and a misdemeanor. The trial court subsequently modified Johnston's probation to include conditions requiring him to provide the passwords for and to submit to searches of his electronic devices and social media accounts.

On appeal, Johnston challenges these probation conditions on reasonableness and overbreadth grounds. Johnston also contends that his defense counsel was ineffective for failing to specifically object to them. We do not decide the merits of Johnston's reasonableness and as-applied overbreadth claims because they were not preserved for appellate review. To the extent Johnston makes a facial challenge to the probation conditions as unconstitutionally overbroad, we reject that claim. We also conclude that Johnston has not demonstrated that his defense counsel was constitutionally ineffective for failing to make a specific objection to the probation conditions.

I. FACTS AND PROCEDURAL BACKGROUND

In November 2015, the Santa Clara County District Attorney charged Johnston by felony complaint with one count of possession of cocaine for sale (Health & Saf. Code, § 11351) (case No. C1524693). In February 2016, the District Attorney charged Johnston by another complaint with possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1); count 1),[1] carrying a loaded firearm when having a prior felony conviction (§ 25850, subd. (a); count 2), and misdemeanor resisting, delaying, or obstructing an officer (§ 148, subd. (a)(1); count 3) (case No. C1631413).

Johnston pleaded no contest to possession of cocaine for sale, as alleged in the first complaint, and possession of a firearm by a felon and misdemeanor resisting, delaying or obstructing an officer, as alleged in the second complaint.[2]

In November 2016, the trial court suspended imposition of sentence in both cases and placed Johnston on formal probation for three years with conditions, including one year of incarceration in the county jail. The trial court also imposed restitution and various fees.

In June 2017, the Santa Clara County Probation Department (Probation) filed a petition with the trial court recommending a modification of Johnston's probation to include gang-related and no-alcohol conditions. Probation noted that, when the police had arrested Johnston in 2015 for cocaine possession (the conduct that led to the first complaint), he was in a well-known Norteño gang ("West Side Mob") area. Probation also described a new arrest for conduct involving suspected West Side Mob gang members and Instagram threats between a current and former girlfriend of one of Johnston's gang associates. A police report attached to the petition stated that an

[1] Unspecified statutory references are to the Penal Code.
[2] Count 2 in the second complaint was subsequently dismissed.

Instagram account with the "handle: wsm_976ers" had a "display photo of Johnston."[3] In addition, Johnston was depicted in a photo on Instagram with other suspected gang members wearing Norteño gang clothing and displaying West Side Mob hand signs. Johnston sported various Norteño gang tattoos and admitted to police his affiliation with the West Side Mob. No new charges or probation violations were filed in connection with this arrest.

In July 2017, the trial court denied the request made by Probation in the June 2017 petition to modify Johnston's probation to include new conditions. The trial court presumed that Probation "did not think there was gang involvement at the time of [Johnston's] sentencing" and commented that the court "can't impose a condition that's not somehow tied to the predicate offenses."

In May 2018, Probation filed another petition with the trial court, again recommending a modification of Johnston's probation to include gang-related conditions and to restrict him from drinking alcohol. Probation noted that, since its last request, Johnston had attended a probation appointment wearing a red " 'Washington Nationals' " baseball cap—"a well known identifier for the Norteño gang, 'West Side Mob.' " Johnston "denied any [gang] affiliation; however, [he] has a history of association with the 'West Side Mob,' and was counseled to refrain from using [*sic*] such attire to the Probation Office and for his own safety." In addition, Probation informed the court that Johnston had been arrested again. The petition described the incident that resulted in Johnston's arrest as involving " 'suspicious gang related activity.' " In the incident precipitating Johnston's arrest, two men wearing red bandanas over their faces walked up to a group of men in an area known to be the territory of a rival gang. One of the two men who were wearing red bandanas was carrying a large knife. There was conflicting

[3] According to the police report, "WSM" is an acronym for West Side Mob and "976" corresponds to WSM on a telephone keypad.

evidence whether Johnston was the man holding the knife. The 2018 petition did not mention the information contained in the June 2017 petition about Johnston's gang-related photos on Instagram.

At a hearing in late May 2018 on the 2018 petition to modify the terms of probation, Johnston's trial counsel requested a one-week continuance to "conduct legal research to advise Mr. Johnston as to his full options of how to address this petition for modification." The trial court granted the request.

In a hearing conducted in early June 2018, Johnston's counsel articulated Johnston's position on the proposed modification of the terms of his probation: "[W]e respectfully object to the modification overall. [¶] We ask the court to specifically consider not imposing some of the specific terms that are requested by probation, specifically the gang registration, which is number 13 on the conditions. We would ask the court not to impose that. As well as the alcohol terms of probation. Mr. Johnston is over 21, and I would urge the court to view any involvement with alcohol that he has as different in nature than involvement with potentially gang-involved people. [¶] The underlying arrest that gave rise to this petition did involve a container in a vehicle. There was no indication that Mr. Johnston was under the influence of alcohol or was driving under the influence and there were multiple people in the vehicle."

The prosecutor concurred with defense counsel's objection to the gang-registration condition but urged imposition of the no-alcohol condition. The trial court agreed that it should not impose the gang-registration condition, and the court rejected two requested gang-registration conditions (numbered 13 and 14).[4] The trial court also declined to impose the no-alcohol condition. The trial court did impose nine new gang-related

[4] Gang-registration condition number 13 was "[t]o be used in cases where Section 186.22 has been charged," and condition number 14 was "[t]o be used in cases where Section 186.22 has not been charged but the offense is gang-related." (Emphasis and some capitalization omitted.) Neither circumstance applied in this case.

conditions. The new conditions included the following two provisions: "6. The defendant shall provide all passwords to any electronic devices (including but not limited to cellular telephones, computers or notepads) within his or her custody or control and shall submit said devices to search at anytime [*sic*] without a warrant by any peace officer"; and "7. The defendant shall provide all passwords to any social media sites (including but not limited to Facebook, Instagram and Mocospace) and shall submit said sites to search at anytime [*sic*] without a warrant by any peace officer."[5] Johnston's counsel did not specifically object to the imposition of these conditions.

Johnston timely appealed from the modification of his probation.

II. DISCUSSION

Johnston raises three claims on appeal. He contends that the trial court abused its discretion when it imposed the electronic devices and social media conditions. Johnston also argues that these conditions are unconstitutionally overbroad. In addition, Johnston claims that his defense counsel was ineffective for failing to object specifically to the two conditions on the grounds he raises in this appeal. For the reasons stated below, we reject Johnston's reasonableness and as-applied overbreadth claims as forfeited by defense counsel's failure to object to the conditions when they were imposed. To the extent Johnston's overbreadth claim is a facial constitutional challenge, we conclude it is meritless. We also conclude that Johnston has not demonstrated that his defense counsel was constitutionally ineffective for failing to make a specific objection to the conditions.

A. *Forfeiture*

In his first claim of error, Johnston contends that the electronic devices and social media conditions serve no compelling state interest and were unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). Specifically, Johnston argues that his crimes of

[5] Hereafter we refer to probation condition number 6 as the "electronic devices" condition and probation condition number 7 as the "social media" condition.

conviction were not gang-related, and there was no suggestion that any electronic devices or social media accounts were used to facilitate his original crimes or to conduct or facilitate subsequent criminal activity.

Johnston acknowledges that his defense counsel made only a general objection " 'to the modification overall' " and did not object to the electronic devices and social media conditions as unreasonable under *Lent*. Johnston concedes that defense counsel's objection was "legally inadequate." (*People v. Welch* (1993) 5 Cal.4th 228, 230, 237 (*Welch*).) Nevertheless, Johnston urges this court to exercise its discretion to consider his reasonableness claim. Johnston argues that merits review is appropriate because his claim is raised in conjunction with his constitutionally based overbreadth challenge. In addition, Johnston contends that we are "in the same position as the trial court" when it made its two modification determinations based on the written material included in the appellate record. In response, the Attorney General states that he "is not contending that appellant's objection to the modified probation terms below was insufficient to preserve [Johnston's] current appellate attacks on the terms."

Despite the Attorney General's decision not to assert forfeiture here, we conclude that its application is appropriate in this case. "[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights." (*In re Seaton* (2004) 34 Cal.4th 193, 198.) "[T]he forfeiture rule applies in the context of sentencing as in other areas of criminal law. As a general rule neither party may initiate on appeal a claim that the trial court failed to make or articulate a discretionary sentencing choice."[6] (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 (*Sheena K.*), internal punctuation omitted.)

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[6] By contrast, appellate courts may intervene in the first instance when an "unauthorized" sentence is imposed without objection, "because such error is 'clear and

As an appellate court, we typically review a trial court's decision to impose conditions of probation for abuse of discretion. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) "That is, a reviewing court will disturb the trial court's decision to impose a particular condition of probation only if, under all the circumstances, that choice is arbitrary and capricious and is wholly unreasonable." (*People v. Moran* (2016) 1 Cal.5th 398, 403 (*Moran*).) However, the "failure to timely challenge a probation condition on '*Bushman*/*Lent*' [reasonableness] grounds in the trial court waives the claim on appeal." (*Welch*, *supra*, 5 Cal.4th at p. 237.)

Johnston argues that we are "in the same position as the trial court to address [the *Lent* reasonableness] issue because the 2017 and 2018 modification hearings were conducted based solely on written materials" in the appellate record. We agree that in some cases the appellate court does stand on an equal footing with the trial court in its ability to assess the appropriateness of probation conditions. However, we do not agree that we are faced with such a case here, both because of the complex balancing of competing interests that must be assessed when imposing conditions related to electronic devices and electronically stored information and because of the facts, which show a nexus between gang activity and Johnston's use of social media but lack a strong link between Johnston's own criminal activity and electronically stored or shared information.

Probation's two petitions and attached police reports demonstrated Johnston's gang affiliation, and the first petition documented his use of social media (Instagram, in particular) to display his gang affiliation. The petitions and police reports also demonstrated Johnston's willingness to participate with other gang members in potentially violent confrontations. If defense counsel had made a specific objection to the electronic devices and social media conditions, Probation or the prosecutor might have

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correctable' independent of any factual issues presented by the record at sentencing." (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

responded by highlighting the available information and articulating how the requested conditions were related to Johnston's past behavior and potential future criminality under the third factor in *Lent*. (*Lent, supra*, 15 Cal.3d at p. 486.) Probation or the prosecutor also may have attempted to present additional information to address any deficiency raised by defense counsel. " '[I]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.] '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' " (*People v. French* (2008) 43 Cal.4th 36, 46.)

When deciding whether to impose conditions regarding the use of electronic devices or social media, a trial court must balance competing interests to determine whether particular conditions are reasonable and appropriate for the defendant. The court has broad discretion to impose probation conditions "as it may determine are fitting and proper to the end that justice may be done . . . and generally and specifically for the reformation and rehabilitation of the probationer. (Pen. Code, § 1203.1, subd. (j).)" (*Lent, supra*, 15 Cal.3d at p. 486; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Computers and the Internet, however, are "virtually indispensable in the modern world of communications and information gathering . . . [and] comprise the backbone of American academic, governmental, and economic information systems. Accordingly, . . . certain restrictions on access to the Internet necessarily curtail First Amendment rights." (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1348 (*Pirali*), internal punctuation and citations omitted.) Given the potential for an intrusion into a defendant's private affairs and protected interests resulting from the electronic devices and social media conditions, a court deciding whether to impose the conditions must weigh such intrusion against the government's legitimate interest in the particular defendant's reformation and

rehabilitation and in safeguarding the community. (See *United States v. Knights* (2001) 534 U.S. 112, 118–119; see also *In re Pedro Q.* (1989) 209 Cal.App.3d 1368, 1373.)

The decision whether to impose the type of probation conditions at issue here should be made by the trial court in the first instance because the determination involves fact-based and case-specific issues, rather than a "review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court."[7] (*Sheena K.*, *supra*, 40 Cal.4th at p. 885; see also *In re White* (1979) 97 Cal.App.3d 141, 148 ["There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances and on its total atmosphere."].) For these reasons, we conclude that Johnston has forfeited his challenge by failing to object to the electronic devices and social media conditions on reasonableness grounds under *Lent*.

Similarly, we conclude that Johnston's overbreadth challenge is unpreserved for appellate review. Johnston argues that his overbreadth challenge "is not forfeited by the failure to raise the claim in the trial court," citing *Sheena K.*, *supra*, 40 Cal.4th at page 889. Johnston's broad assertion is correct only to the extent that his challenge to the probation conditions is a facial one that raises " 'pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court.' " (*Ibid.*; see also *Moran*, *supra*, 1 Cal.5th at p. 403, fn. 5.)

Johnston argues that the electronic devices and social media conditions are unconstitutionally overbroad because they "allow eavesdropping on all communications having nothing to do with either [his] prior crimes of conviction or with his probation officer's current fear of his increasing involvement in the criminal aspects of a gang." He

[7] The record here reinforces the importance and utility of specific objections. Defense counsel asked the trial court not to impose the gang registration condition and no-alcohol condition. In response, the prosecutor concurred regarding the gang registration condition, and the trial court rejected Probation's request for gang registration and no-alcohol conditions.

also compares and distinguishes the factual circumstances in this case with those in two other cases decided by this court, *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*) and *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*).

From our examination of Johnston's arguments, we conclude that he has not raised a "pure question of law" but instead is making an as-applied overbreadth challenge that should have been preserved by objection in the trial court. (*Sheena K., supra*, 40 Cal.4th at p. 888.) Because Johnston's defense counsel did not object to the electronic devices and social media conditions on overbreadth grounds, we decline to address his as-applied overbreadth challenge for the same reasons we do not decide his *Lent* reasonableness claim. (See *People v. Guzman* (2018) 23 Cal.App.5th 53, 63, fns. 3 & 4 (*Guzman*); see also *Pirali, supra*, 217 Cal.App.4th at p. 1347.)

B. *Facial Overbreadth*

Although we decline to reach Johnston's forfeited as-applied overbreadth challenge, to the extent his claim can be construed as a facial challenge, we will consider whether the electronic devices and social media conditions, on their face, violated his rights under the First and Fourth Amendments to the United States Constitution.

"[A] facial overbreadth challenge is difficult to sustain." (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 577.) Such a challenge "is an assertion that the [probation condition] is invalid in all respects and cannot have any valid application, or a claim that the [probation condition] sweeps in a substantial amount of constitutionally protected conduct." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1109, citation and italics omitted.) "A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra*, 40 Cal.4th at p. 890.) We review de novo constitutional overbreadth challenges to probation conditions. (*Appleton, supra*, 245 Cal.App.4th at p. 723.)

Johnston contends that the electronic devices and social media conditions are overbroad because they require him "to submit to unfettered search of his electronic devices and social media accounts" and are not closely tailored to a legitimate state purpose. In support of his claim, Johnston relies on *Riley v. California* (2014) 573 U.S. 373 (*Riley*). The court in *Riley* held that law enforcement "must generally secure a warrant" before searching a cell phone. (*Id*. at p. 386.) The court rejected an argument that the search of a suspect's cell phone was "materially indistinguishable" from the search of an arrestee or an item such as an arrestee's wallet or purse. (*Id*. at p. 393, internal quotation marks omitted.) The court explained, "Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse." (*Ibid*.) The court's ruling in *Riley*, however, was narrow: "Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." (*Id*. at p. 401.)

Riley is inapposite in the context of a facial overbreadth challenge to probation conditions permitting warrantless searches of electronic devices and social media accounts. "When the *Riley* defendant's cell phone was searched, he had not been convicted of any crime and thus he was still protected by the presumption of innocence." (*Guzman*, *supra*, 23 Cal.App.5th at p. 64.) Johnston, of course, is a probationer. *Riley* did not consider the constitutionality of probation conditions, and the balancing of the state's interests and the defendant's privacy interests regarding probation conditions is markedly different. (See *id.* at pp. 64–65.)

Johnston also relies on this court's decision in *Appleton* to argue that the "search conditions at issue here are even broader and more unlimited than the conditions imposed [and struck down] in *Appleton*." *Appleton*, however, did not involve a facial challenge to

an electronic device search condition and therefore does not assist Johnston.[8] (*Appleton*, *supra*, 245 Cal.App.4th at pp. 721, 727.)

"We recognize that [a defendant's] probation status does not completely vitiate his constitutional privacy rights. (*Appleton*, *supra*, 245 Cal.App.4th at p. 724.) However, the fact that a search of an electronic device may uncover comparatively more private information than the search of a person, or a personal item like a wallet, does not establish that a warrantless electronic search condition of probation is per se unconstitutional. (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*).)" (*Guzman*, *supra*, 23 Cal.App.5th at p. 65, fn. omitted.) The probation conditions upheld in *Ebertowski* are almost identical to the electronic devices and social media conditions imposed on Johnston. Thus, we cannot say that such conditions are never appropriate. For these reasons, we conclude that the electronic devices and social media conditions imposed on Johnston are not unconstitutionally overbroad per se.

C. *Ineffective Assistance of Counsel*

Johnston claims that his defense counsel was prejudicially ineffective for failing to object specifically to the electronic devices and social media conditions. Johnston argues that his counsel should have objected under *Lent* and on constitutional overbreadth grounds under the First and Fourth Amendments. Johnston notes that his counsel asked for and received a one-week continuance to conduct legal research and advise him about the modification request. He claims that "reasonably prepared defense counsel would

[8] Johnston contends the electronic devices and social media conditions "may also implicate the privacy interests of third parties." The Attorney General responds that Johnston lacks standing to assert the third-party privacy interests. Johnston's argument is foreclosed by *In re Q.R.* (2017) 7 Cal.App.5th 1231, review granted April 12, 2017, S240222. There, the court reasoned that the minor could "safeguard the rights of third parties by advising them that information they make accessible to him is not private. Further, any speculative impact on third parties is not a reason to strike the condition since [the] minor lacks standing to assert the constitutional rights of third parties." (*Id*. at p. 1237.)

have been aware that the California Supreme Court was already reviewing the propriety of the electronic devices search term at issue here and had granted review in a very large number of published and unpublished cases raising this issue."[9] Johnston asserts that " 'there simply could be no satisfactory explanation' for counsel's failure to object on correct legal grounds and to apprise the court of the constitutional shortcomings of the proposed search conditions." He also argues he was prejudiced by counsel's failing, because there would have been a reasonable probability that, had counsel objected, the trial court would have declined to impose the requested conditions.

To show that his counsel was ineffective, Johnston must establish both that counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) Johnston bears the burden of demonstrating by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness. (*In re Thomas* (2006) 37 Cal.4th 1249, 1257.) "An attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel." (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) Ineffective assistance of counsel is particularly difficult to demonstrate on direct appeal, where we are limited to the record from the trial court. "The appellate record . . . rarely shows that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored." (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) "Unless a defendant establishes the contrary, we shall presume that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be

[9] Johnston cites several cases in which the California Supreme Court has granted review to address similar challenges to electronic device search conditions, including the lead case, *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923.

explained as a matter of sound trial strategy." (*Ibid*., internal quotation marks omitted.) "If the record sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected . . . unless there simply could be no satisfactory explanation." (*Ibid*., internal quotation marks omitted.)

On the record before us, we cannot say that there is no satisfactory explanation for defense counsel's failure to object to the electronic devices and social media conditions. We presume, based on defense counsel's statements, that she conducted legal research and advised Johnston about "his full options of how to address [Probation's] petition for modification." Defense counsel made a nonspecific objection to the "modification overall" and asked the trial court not to impose the gang registration and no-alcohol conditions. By objecting to certain conditions and not others—after conducting research and advising and consulting with her client—the record suggests defense counsel had tactical reasons for her actions. Defense counsel's argument against the no-alcohol condition suggests that she was trying to highlight the lack of evidence of Johnston's alcohol use and to separate his alcohol use from his gang affiliation. Specifically, counsel "urge[d] the court to view any involvement with alcohol that he has as different in nature then involvement with potentially gang-involved people."

Thus, a key premise of defense counsel's successful argument as to the no-alcohol condition was that Johnston's alcohol use should be viewed distinctly from his gang activity. While there was little evidence of alcohol use by Johnston, the police reports concerning Johnston's previous 2017 arrest documented his use of social media in a manner directly related to his gang affiliation. Johnston apparently had an Instagram account with a username that referenced the West Side Mob gang. He also was spotted by police in an Instagram photo with other suspected gang members wearing Norteño gang clothing and displaying West Side Mob hand signs. Given this information, it would have been difficult for defense counsel to argue about Johnston's use of electronic

devices and social media and his use of alcohol employing a consistent rationale. Although the record before us is limited, defense counsel here could have reasonably chosen not to object specifically to the electronic devices and social media conditions given the evidence and the greater likelihood of success with other objections. (See *People v. Kendrick* (2014) 226 Cal.App.4th 769, 779.)

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that [she] did so for tactical reasons rather than through sheer neglect. [Citation.] That presumption has particular force where a [defendant] bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.' " (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.)

Because there could be a satisfactory explanation for defense counsel's failure to object specifically to the electronic devices and social media conditions, we reject Johnston's contention that, based solely on the appellate record, counsel's failure amounted to deficient performance under *Strickland*.[10]

III. DISPOSITION

The order modifying probation conditions is affirmed.

[10] Having concluded that Johnston has not satisfied the performance prong of the *Strickland* standard, we need not address whether he can demonstrate the requisite prejudice for his claim of ineffective assistance of counsel. (*Strickland, supra,* 466 U.S. at p. 687.)

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DANNER, J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, ACTING, P.J.

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GROVER, J.

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